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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 29 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition[1] was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sushi & Asian fusion food restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi & Korean food chef pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) as an alien with exceptional ability. The petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification (ETA Form 9089), which was certified by the Department of Labor (DOL).

The director determined that the Form ETA 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel indicated that he would submit his brief and/or additional evidence to the AAO within 30 days. Counsel dated the appeal June 24, 2010. As of this date, more than five months later, the AAO has received nothing further. The AAO will review and consider the evidence in the record in adjudicating the instant appeal.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the

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[1] Counsel claims that the instant petition is filed for amending a previous petition ([redacted]). The record shows that the previous petition was filed on March 27, 2007 for the instant beneficiary in the position of sushi chef based on the underlying labor certification under classification of EB3 as a skilled worker, and the petition was approved on April 18, 2007.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on November 20, 2009. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. In the submission letter, counsel clearly indicated that the instant petition was filed for "EB-2 Worker of Exceptional Ability in the Arts (Culinary)."

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the proffered position is sushi chef and the proffered wage is $11.00 per hour. Part F of the ETA 9089 indicates that the DOL assigned the occupational code of 35-2014.00 and title of restaurant cook, to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.[3]

The O*NET online database states that this occupation falls within Job Zone Two. According to the DOL, some preparation is needed for Job Zone Two occupation. The DOL assigns a standard vocational preparation (SVP) of 4.0 < 6.0 to Job Zone Two occupations, which means "these occupations usually require a high school diploma." *See http://online.onetcenter.org/link/summary/35-2014.00* (accessed on October 28, 2010). Additionally, the DOL states the following concerning the training and related experience required for these occupations:

> Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.

[3] *See* http://www.bls.gov/soc/socguide.htm.

> Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.
>
> These occupations often involve using your knowledge and skills to help others. Examples include sheet metal workers, forest fire fighters, customer service representatives, physical therapist aides, salespersons (retail), and tellers.

See id. Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position may properly considered under the skilled worker category, but not under the EB2 as a member of the professions holding advanced degrees or an alien of exceptional ability.

In addition, to determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The job offer portion of the ETA Form 9089 indicates that the proffered position does not require any education and training, but 24 months (two years) of experience in the job offered. Line 11 describes job duties for the proffered position as "1. Prepares and seasons a large variety of sushi dishes, sections fish, prepares sushi rolls, operates sushi machine and prepares presentation to customer. 2. Prepares a variety of Korean style dishes such as Kal Bi, Bul Go Gi, Hae Mul Jun Gol." Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability as minimum requirements for the proffered position. Therefore, the petition cannot be approved for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file a petition for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act. The AAO notes that the petition [redacted] was properly filed and approved for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act based on the underlying labor certification.

On appeal, counsel asserts that the director erred in finding that the position did not require a person of exceptional ability, the job description, as set out in the petitioner's reply to the director's request for evidence, does require a person of exceptional ability, and that the beneficiary did have at least three requirements from the exceptional ability list. Counsel here has not specifically addressed the reasons stated for denial. The director denied the petition because he found that the underlying ETA Form 9089 does not require an advanced degree or exceptional ability as the minimum requirements for the proffered position. However, counsel failed to submit any additional evidence showing that the labor certification does require an advanced degree or exceptional ability for the proffered position.

Counsel's assertions on appeal and the evidence previously submitted in the record do not establish that the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and thus, cannot overcome the ground of the director's denial. Therefore, the appeal must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition remains denied.